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In the Supreme Court of the United States

October Term, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS, AND EDWIN McBRAYER,
Petitioners,

vs.

N.T. GREENE, ELNORA PRIEST CROSS, EDWIN OWENS AND CAROLYN BURSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 1, 1979.

OPINIONS BELOW

The October 4, 1974, "Order on Motions to Dismiss" filed by the District Court for the Western District of Tennessee, Western Division, has not been officially published, and appears in the Appendix at page A1. (All references to Appendices to this petition are hereafter preceded by designation "A".) The opinion of the Sixth Circuit Court of Appeals, decided May 13, 1976, reversing the October 4, 1974, district court order, and remanding the cause back to the district court, is reported at 535 F.2d 976 (6th Cir. 1976), and is printed at (A11). The memorandum decision of the District Court for the Western District of Tennessee, Western Division, filed June 21, 1978, has not been officially published, and appears in the Appendix at (A19). The opinion of the Sixth Circuit Court of Appeals filed November 1, 1979, reversing the district court judgment and remanding the cause for the fashioning of appropriate injunctive relief has not yet been officially reported, and is set out at (A38). The order of the Sixth Circuit Court of Appeals denying the petitioners' petition for rehearing with a suggestion that the petition be heard by the court sitting en banc was filed December 11, 1979, and has not been officially published. It appears in the Appendix at (A70).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered November 1, 1979. On December 11, 1979, the court filed an order denying the petitioners' request for a rehearing with a suggestion that the petition be heard by the court sitting en banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The questions presented for review in this petition for Writ of Certiorari are:

1. Whether a municipality's exercise of its police powers to close a street to through traffic in order to achieve in a residential area permissible goals of reducing the flow of traffic, enhancing safety, and reducing noise and litter, constitutes a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution when there is no evidence that racial motivation or intent was a factor in the decision?

2. Whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution can be established without a showing of racially discriminatory intent or purpose?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Thirteenth and Fourteenth Amendments to the United States Constitution. Those Amendments read as follows:

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. Vol. 1 U.S.C. pg. XLVII (1964).

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. Vol. 1 U.S.C. pg. XLVII (1964).

The federal statutory provisions involved in this case are 42 U.S.C. §1982 and 42 U.S.C. §1983. 42 U.S.C. §1982 (1964) provides in Vol. 9 U.S.C. pg. 8020:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §1983 (1964) provides in Vol. 9 U.S.C. pg. 8021:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

The Charter of the City of Memphis, Tennessee, provides on page 198 in Section 452 as follows:

> The governing authorities of said City of Memphis shall have full authority to convey any property acquired by them or held by the City of Memphis not used for municipal purposes, and to give good title thereto to any purchaser. Said City shall also have power to convey any street or alley closed by it by virtue of municipal authority, and to convey good title to said street or alley as far as any title held by said City is concerned. The said City shall further have authority to close by resolution any street or alley whenever, in the judgment of the Board of Commissioners, the closing of said street or alley shall be conducive to the public welfare. (Priv. Acts 1913 C.H. 163; Priv. Acts 1939, C.H. 173, Section 2).

STATEMENT OF THE CASE

Procedural Background

This action originated in 1974 with the filing of a complaint in the United States District Court for the Western District of Tennessee, Western Division, by N.T. Greene, and others who are no longer active participants in the lawsuit. The complaint alleged that the proposed partial closing of a portion of a public residential street known as West Drive, located in the City of Memphis, Tennessee, was racially discriminatory. This portion of the complaint, as amended, was dismissed by the district court upon a Motion to Dismiss filed on behalf of defendants. (A1).

On appeal the United States Court of Appeals for the Sixth Circuit reversed and remanded the cause on the basis that in the court's opinion the original plaintiff,

Greene, had stated claims upon which relief might be granted under 42 U.S.C. §1982 and 42 U.S.C. §1983. *See, Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976). (A11).

In its opinion remanding the cause, the court stated in part:

> "We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. §1982 confers on '(a) all citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.' The complaint and amended complaint construed favorably to the pleader reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race 'hold' their 'real property', on a less equal basis, than similarly situated whites who 'hold' their 'real property' subject to having the City confer the dead-end street benefit on their property. 535 F.2d at 978. . .
>
> We view Greene as having stated §1983 claims against the Mayor and Council Chairman, those 'person(s)' clearly acting 'under color of . . . ordinance' and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on 'white' streets, but not on 'black' streets, because of the color of the residents of the streets." 535 F.2d at 978, 979.

After remand, intervention was allowed for plaintiffs Owens, Burse, and Cross and amendments to the complaint

concerning the lack of sidewalks along West Drive, the existence of a class action and pendent jurisdiction were allowed. Jurisdiction in the district court was based on 28 U.S.C. §1343 (3) and (4). (See p. 2 of the district court's Pre-Trial Order). A two-day trial was held before the trial judge without the intervention of a jury. On June 21, 1978, the district court held that the partial closing of West Drive would not violate plaintiff's rights under either 42 U.S.C. §1982, 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, or pendent State law claims. The court set forth its findings of fact and conclusions of law in a memorandum decision. (A19). The trial court held, making reference to the Sixth Circuit's earlier observations:

> . . . that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens. (A43).

The court went further and held that, in addition, "there is not sufficient proof of racially discriminatory intent or purpose on the part of the City officials to establish a constitutional violation." (A43). The court also found that there were not any violations of the plaintiffs' rights under either the Due Process or Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. (A57).

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of the district court. The cause was remanded for the fashioning of appropriate injunctive relief. (A58).

The Sixth Circuit majority opinion concluded that the erection of a barrier at the northern boundary of West Drive constituted a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment to the United States Constitution and entitling them to relief under 42 U.S.C. § 1982. (A57).

The majority opinion agreed with the district court's conclusions that there was no basis for the relief requested by the plaintiffs seeking sidewalks, curbs and gutters along West Drive, and that the plaintiffs had failed to prove their claims of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments. (A57).

A dissenting opinion was filed in the Sixth Circuit Court of Appeals by Circuit Judge Anthony J. Celebrezze. The dissenting opinion noted that the majority opinion expanded the scope of 42 U.S.C. §1982 to an unprecedented extreme and conflicted with the well-established policy of judicial deference to legislative judgment in land use regulation. It noted that a finding of discriminatory intent or purpose should be a requirement to establishing a violation under 42 U.S.C. § 1982. (A61).

Petitioners asked for a rehearing with a suggestion that the rehearing be held en banc, however, since less than a majority of the judges of the court who were in regular active service favored a rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. The original panel denied the

petition for rehearing, with Judge Celebrezze again dissenting on December 11, 1979. (A70).

Statement of Facts

On July 9, 1973, an application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association for the closing of a portion of a public residential street known as West Drive, which would make that street into a cul-de-sac. The application states that the reasons for the requested closure are to:

1. Reduce flow of through traffic using subdivision streets,

2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School,

3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interuption (sic) of community living. (Trial exhibit 13).

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government in an attempt to discern their feelings regarding the closure. The information sought is of an advisory nature and is not controlling upon either the Planning Commission or the City Council. After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (Transcript, hereinafter designated as "TR.", pgs. 173, 174 and Trial exhibit 4).

The matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing including respondent, Greene. Each side was given fifteen (15) minutes to present their views. (Trial exhibit 26).

After the presentations were made and discussion was had among the members of the City Council, a vote was taken on the resolution to close a portion of West Drive with certain conditions. The resolution passed. (Trial exhibits 1 and 26).

On several subsequent occasions the City Council reconsidered its action, and each time voted in favor of closing a portion of West Drive to through traffic. (Trial exhibits 2, 27, 28, 29, 30, 31, 32 and 41).

The closing procedure used by the City Council had never before been used to close a street that served as a thoroughfare for the residents and the public. It had, however, been used on numerous other occasions to close alleys and dedicated, but unused streets. From that standpoint the closing procedure used by the City Council has benefited black citizens, as well as white citizens. (Trial exhibits 33, 34, 36, 37, and 39 and TR. 257-260, 262-264, 265-270).

West Drive is a two-lane residential street beginning on the northern boundary at its intersection with Jackson Avenue and proceeding in a southerly direction to its terminus at its intersection with North Parkway approximately one-half mile from its beginning at Jackson Avenue. Opposite West Drive on the north side of Jackson Avenue

is a major four-lane thoroughfare, known as Springdale Street.

At the time the City Council voted to close a portion of West Drive and at the time of the trial in the district court, all of the residents along West Drive were white. The district court took judicial notice during closing argument of counsel that the area north of Jackson in this vicinity was predominantly black. (TR. 323-324).

The rationale behind the closure of this street was to provide the residents of the area with a more tranquil neighborhood. (TR. 205). Traffic is not greatly inconvenienced by the closure, since one block to the east is a street that gives straight access all the way to South Memphis and the State of Mississippi. To the west are University and McLean Streets, which are major thoroughfares offering additional access to South Memphis and to Overton Park and Snowden School. (TR. 205-206). Access to the Hein Park Subdivision remains available on the northern side at the intersection of Jackson and Cypress Drive and at the intersection of Jackson and Charles Drive. (TR. 205).

The respondents offered the testimony of Mr. Harold Moore, a licensed real estate broker to the effect that the proposed closing would be a real benefit to the residents on West Drive. Mr. Moore also testified "there would not be a lessening of value in those properties in the Springdale area". (TR. 91, 92). The Sixth Circuit Court of Appeals opinion noted that subsequently Mr. Moore testified that there could be a deterring psychological effect on those individuals who live north of the Hein Park area, and he speculated that this could have a detrimental effect on the property values in the future. (A48). The district judge, however, apparently did not accept

this latter speculation, since it was not included in his findings of fact. (A47).

Dr. Marvin Feit also testified as an expert witness that closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. (TR. 102, 103).

The district court after finding that the closing procedure used by the City of Memphis had benefited black citizens, as well as white citizens, continued its analysis of the Council's action by considering the factors enunciated by this Court in *Arlington Heights v. Metropolitan Housing Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) as relevant to a sensitive inquiry into the motivations of a legislative or administrative body. The district court in analyzing the present case according to the standards of *Arlington Heights, supra,* found that the closure of West Drive in the manner adopted by the City Council would have a disproportionate impact on certain black citizens. (A43). This disparate impact according to the court, existed because "the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return." (A44).

The petitioners in their brief filed in the Court of Appeals took exception with this finding on the basis that the court had compared the effect on black motorists with the effect upon white residents along West Drive, which the petitioners claim are not similarly situated classes.

(See brief of appellees in the United States Court of Appeals for the Sixth Circuit, pgs. 21 and 22).

Nevertheless, the district court found that the disparate impact was not so stark as to infer a purpose or intent of racial discrimination by the Council. (A43). The court upon examining the other factors listed in *Arlington Heights, supra,* found that there was not sufficient proof of racially discriminatory intent or purpose upon the part of the city officials to establish a constitutional violation. (A44).

The majority opinion of the Sixth Circuit Court of Appeals does not even address the question of whether there was adequate proof of racial motivation or intent on the part of the Council. In a footnote near the end of the majority's opinion, the court stated "we expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under §1982." (A57).

In his dissent, Judge Celebrezze agreed with the district court that there was a disparate impact caused by the closing of West Drive that was both racial and geographical in nature. (A61). He also agreed with the district court that this disparity did not constitute a stark pattern of discrimination which would permit one to infer racial intent. He noted, "the record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive 'because of' the adverse effects the black citizens north of Hein Park might experience." (A67). His use of the words "because of" was a result of the standard set by this Court's opinion in *Personnel Administrator of Mass. v. Feeney,* ..... U.S. ....., 99 S.Ct. 2282 (1979).

REASONS FOR GRANTING CERTIORARI

In *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969), this Court held in a divided opinion that the City of Jackson, Mississippi, had not denied Negroes equal protection of the laws when it decided to close the public pools operated by that City, rather than attempt to operate them on a desegregated basis. Unlike the facts in the case at bar, the City of Jackson, Mississippi, had been involved in extensive litigation concerning desegregating its public parks, auditoriums, golf courses, the City Zoo, and its public swimming pools. This Court held that since the pools were closed to all citizens of Jackson, both black and white, the City's action did not deny black citizens equal protection of the laws under the Fourteenth Amendment.

In the last portion of the majority opinion, Mr. Justice Black, discussed the possible application of the Thirteenth Amendment to this type of fact situation. He said:

> "Finally, some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment which freed the Negroes from slavery. The argument runs this way: The first Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552, 16 S.Ct. 1138, 1143, 41 L.Ed. 256 (1896), argued strongly that the purpose of the Thirteenth Amendment was not only to outlaw slavery but also all of its 'badges and incidents.' This broad reading of the amendment was affirmed in Jones v. Alfred H. Mayer Company, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a 'badge or incident' of slavery. Consequently, the argument seems to run, this Court should declare

that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in Jones v. Alfred H. Mayer Co. could empower Congress to outlaw 'badges of slavery.' The last sentence of the Amendment reads:

> 'Congress shall have power to enforce this article by appropriate legislation.'

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities." 403 U.S. at 226, 227, 91 S.Ct. at 1945, 1946.

It is respectfully submitted that Mr. Justice Black's analysis of the Thirteenth Amendment in *Palmer, supra,* applies with equal force to the facts of the case at bar.

The closing of West Drive prohibits vehicular access from the north to all motorists, be they black, yellow, red, white, or any other color, creed or race. It applies to all motorists regardless of where they might live or whether they own, lease or hold any property whatsoever. (Contrast with *Jennings v. Patterson,* 488 F.2d 436 (5th Cir.

1974), wherein the erection of a barricade on a public street deprived only black persons from the use thereof; the only white person inconvenienced by the barricade being offered private access to the closed street.)

The Sixth Circuit's majority opinion rested its conclusion that the closure of West Drive constituted a "badge of slavery" in violation of the Thirteenth Amendment and 42 U.S.C. §1982 upon its finding that the community to be benefited by the closing was and historically had been all white, while the territory to be burdened by the closing was predominantly black, and that the barrier was to be erected at the point of separation of these neighborhoods. It also found that the closing represented a unique step to protect this neighborhood from outside influences. (A56).

The majority opinion also held that there was "some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with the corresponding increase in the property values in Hein Park." (A56-A57). As has been noted previously in this petition, the district court in fact found only that there would be an increase in the property values in Hein Park as a result of the closing. He did not credit the testimony of the respondents' witness concerning an economic depreciation in the property value of the area north of West Drive. (A56).

The fact that the action of the City Council was an initial and unique attempt to utilize existing procedures prescribed by law for closing a street should not, without more, constitute proof of racially discriminatory intent; nor did the respondents' proof at trial indicate that the racial segregation that existed between the Hein Park neighborhood and the area to the north was in any way the result of action upon the part of the petitioners.

The location of the barrier at the northern end of West Drive was erected at that particular point, not because it represented the precise point of separation between the neighborhoods, but because it is the point where a major four-lane thoroughfare funnels into a two-lane residential street.

Unfortunately, the Court of Appeals majority opinion in its attempt to conduct the sensitive inquiry required by *Arlington Heights, supra,* went beyond the findings of the district court and substituted speculation and suspicion for proof.

Petitioners are keenly aware that this Court does not grant Certiorari merely to review the findings of fact of a Court of Appeals. Factual analysis, however, is critical in this case, since the majority opinion has stretched 42 U.S.C. §1982 and its underlying basis, the Thirteenth Amendment, into a new frontier.

The question left open by the Sixth Circuit majority opinion concerning whether racially discriminatory intent is a necessary element of a claim based on these sections has significant implications. The majority's opinion ignores the fact that aside from some evidence of disparate impact, there is no evidence in this record to support a finding of racially discriminatory motivation or intent.

The dissent after noting that the disparate impact is both racial and geographic in nature logically deduces that the impact is caused by the obvious distinction between residents and non-residents along West Drive. He also notes that the disparate impact results from motivations that have been held by this Court to constitute reasonable distinctions between the classes of residents and non-residents. *County Board of Arlington County, Virginia, et al. v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

While not addressing specifically the question of whether racially discriminatory intent is a necessary ingredient in a case involving the Thirteenth Amendment and 42 U.S.C. §1982 this Court in *Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), peripherally discussed the requirements of 42 U.S.C. §1982 and said "indeed, even the respondents seem to concede that, if Section 1982 'means what it says' - to use the words of the respondents' brief - then it must encompass every *racially motivated* refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing." 392 U.S. at 421, 422, 88 S.Ct. at 2194 (Emphasis added).

In addition, the *Jones* case, *supra*, notes that Congress intended Section 1 of the Civil Rights Act of 1866, which is the source of 42 U.S.C. §1982, to prohibit *all racially motivated* deprivations of the rights enumerated in the statute. . . 392 U.S. at 426, 88 S.Ct. at 2196. (Emphasis added to words racially motivated). Section 2 of the 1866 Act lends further credence to this position by imposing criminal sanctions upon anyone who under color of law, statute, ordinance, regulation, or custom, deprives someone of a right secured by the Act "*by reason of his color or race*" 14 Stat. 27. (Emphasis added).

Even the Sixth Circuit in its original opinion in this case indicated that a necessary element of the respondents' case under 42 U.S.C. §1982 was proof of racially discriminatory intent. *See*, 535 F.2d 976 at 979 (6th Cir. 1976). (A11).

In this case the Court of Appeals majority opinion has reversed the findings of the district court on nothing more than coincidence, innuendo, and suspicion. It refused to set forth any guidelines concerning what constitutes a "badge of slavery" because it was aware that

any fair, comprehensive listing of requirements would have excluded the present fact situation from its purview. All of the cases listed in the majority opinion as examples of past discriminatory practices are easily distinguishable from the facts surrounding this street closure, which applies its benefits and detriments totally without regard for the race, creed or color of any person.

Any possible adverse effects that flow from the closing adhere to all non-residents who hold property north of West Drive regardless of their race, creed or color. All citizens, regardless of their race, creed or color, may traverse through Hein Park by other routes or along the remaining areas of West Drive at any time. In contrast, all of the cases cited by the majority opinion involved attempts to exclude all Negroes, because of their race, from rights that were available to all white persons.

Surely the possibility that some black persons may feel increased hostility after the closing and commit acts of vandalism cannot constitute competent proof of racially discriminatory intent on the part of the City Council of Memphis, Tennessee.

In short, the City of Memphis through its Council has exercised its lawful authority to close streets for reasons which this Court has found in the past constitute valid distinctions between residents and non-residents. As a result of residential housing patterns, it appears that perhaps more black citizens will be inconvenienced by the street closing than white citizens. Having established that scenario, it is imperative that a court undertake a diligent factual inquiry into the motivations of the legislative body that precipitated this action. By omitting the requirement that a plaintiff prove that racially discriminatory intent was a motivating factor in the Council's decision, the Court of Appeals opinion creates unwarranted

conflict between the requirements of two vital sister sections of our Constitution. Perhaps, more importantly, it subjects legislative and administrative bodies to the risk of having their actions indiscriminately labeled "badges of slavery" without adequate guidelines or standards of proof. This case graphically illustrates the consequences of such a position.

CONCLUSION

Petitioners respectfully request the Court, for all the reasons set forth above, to grant Certiorari, to reverse the decision of the Sixth Circuit Court of Appeals below, to reinstate the judgment of the district court below, and to resolve the important question concerning the necessity for proof of racially discriminatory intent when a claim is based upon an alleged violation of the Thirteenth Amendment and 42 U.S.C. §1982.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
NO. C-74-208

N. T. GREEN, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, and SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor, et al,
Defendants.

ORDER ON MOTIONS TO DISMISS

(Filed October 4, 1974)

Plaintiffs allege that they are citizens of Memphis and that two civic clubs, Wilshire Park and Shankman Hill, also plaintiffs, are unincorporated associations of "similarly situated persons." They sue the City of Memphis, the City Council, and the Chairman of the City Council on the following asserted bases:

(1) 28 U.S.C. 1343(3) to redress the deprivation, under color of state legal action, of constitutionally secured personal and property rights;

(2) 42 U.S.C. 1982 to insure that all persons have same rights and enjoyments as those of white citizens;

(3) 28 U.S.C. 2201 for declaratory judgment. Specifically, plaintiffs complain about two specific actions of

the City Council and/or the Mayor in "striking from municipal budget . . . a $750,000 federal-state financed Community Center in plaintiffs' neighborhood," and "in closing through traffic access to West Drive between Jackson Avenue and North Parkway." They seek mandatory relief from the Court to correct these allegedly unconstitutional acts and violations of their civil rights.

Defendants have filed a motion to dismiss on the basis of asserted lack of jurisdiction in the Court, and because no substantial cause of action arising under the laws or Constitution is alleged. First attention is given to the prospective closing of West Drive.[1]

I. WEST DRIVE CLOSING AT NORTH END

It may be deemed to have been a moot issue relative to the closing of West Drive at its northern terminus, Jackson Avenue, since no actual impediment to passage at this point has been erected, except that a declaratory judgment as to the rights of the parties might be appropriate if the Court has jurisdiction of this cause of action and these parties for any purposes. 42 U.S.C. 1982[2] came into being after the Civil War to prohibit discrimination against negroes in the inheritance, purchase, sale, holding or conveying of property. *Hurd v. Hodge*, 334 U.S. 24 (1948); *Jones v. Mayer Co.*, 392 U.S. 409 (1968). These cases gave a broad construction to the language of the statute. Nowhere, however, has this language been

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1. At the hearing it was disclosed that West Drive had not actually been closed, but plaintiffs protest the resolution authorizing the closure at Jackson Avenue.

2. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

construed to confer property rights to Negroes *beyond* those which belong to white citizens. None of the plaintiffs on West Drive;[3] none are deprived of reasonable ingress and egress to their property; the street is not proposed to be closed to blacks and open to whites. In short, the effect of the proposed closing, whether wise or unwise, is the same upon whites as it is to blacks. *Palmer v. Thompson*, 403 U.S. 217 (1971). There is no facial discriminatory import to the resolution of closure, and there is no assertion that it will be implemented or administered in a racially discriminatory fashion or effect. Plaintiffs complain only that they will be denied access to West Drive from the north just as every other citizen will be. Attached to this Order is a city map showing the location of the area in controversy. It shows that by a very short detour to the east or west via Charles or Cypress Drive, one may proceed southwardly from Jackson Avenue towards North Parkway via a portion of West Drive, and that within approximately one quarter to a half mile east or west of West Drive there are "through streets"[4] providing non-stop direct routes from Jackson to North Parkway without an intervening stop or bends or curves as on West Drive. See *Mandell v. Commissioners of Bernalillo Co.*, 99 P(2d) 108, 4 NM 109 (.....). Plaintiffs also contend that there was no "public notice" of the action taken with regard to the resolution. Regardless of this contention, which the Court does not reach, this attempted attack upon the right to close the access to West Drive at one end of this approximately one-half mile long road is unavailing. Plaintiffs as "citizens" who do not assert

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3. The nearest named plaintiff lives, according to the City Directory, many blocks from West Drive. A number of others claiming to be interested in a letter to the Court live at least four blocks away.

4. Trezevent and University.

themselves to be contiguous or adjacent property owners, have no such public property right in the entry to a street, which is not alleged to be essential to them for any purpose, to petition this Court to require it to remain open for their possible convenience. Plaintiffs have no standing for this purpose. Plaintiffs have not been denied their interstate right to travel, or their "equal utilization, without discrimination upon the basis of race, of any public facility "or to travel freely upon *interstate* highways or other instrumentalities as in *United States v. Guest*, 383 U.S. 745, 757 (1966). This is not a case of asserted discrimination against blacks in deprivation of necessary public instrumentalities, such as utilities or paved streets, or of unequal treatment in the furnishing of these essential instrumentalities. Plaintiffs have failed to state a cause of action with respect to the purported West Drive closure, as and if effectuated, whether on the basis of racial discrimination or on the basis of unequal protection of rights. "Subject to the limitations contained in the Constitution . . . the power of a state to vacate streets or other public ways within its borders is plenary and absolute, and this power may be exercised by the state legislature or may be delegated to a municipal corporation. . . ." 64 C.J.S., *Municipal Corporations*, Sec. 1665. See *Cash & Carry Lbr. Co. v. Olgiatti*, 215 Tenn. 287, 385 S.W.2d 115 (1964).

Plaintiffs have no constitutional property rights in continued access to West Drive under the facts asserted or on the basis asserted in the complaint. They have no standing as affected property owners on the street to due process notice and hearing.

"In the absence of an allegation of fraud or a manifest abuse of discretion, courts will not inquire into the motives of municipalities for vacating a municipal street." *Sweetwater Valley Mem. Park v. City of Sweetwater*, 372

S.W.2d 168 (Tenn. 1963) cited in *Cash & Carry Lbr. Co. v. Olgiatti, supra,* 385 S.W.2d 117.

Whether or not the state or local statutory procedure in bringing about the alleged impending closure was followed is a state court matter not a federal question concerning which this Court has jurisdiction. See *Byington v. Bass,* 11 Tenn. App. 569, 572 (1930) holding that the general public, not relying upon subdivision representations, have no such property right as claimed by plaintiffs in a street similar to West Drive.[5]

II. STRIKING COMMUNITY CENTER BUDGET ITEM

Plaintiffs ask that the Court "by mandatory orders . . . specifically provide fundamental services and allocate governmental funds (a) to construct and federally finance or otherwise pay for a $750,000 community center in plaintiffs' neighborhood. . ." Again, with reference to the city map hereinabove made reference to, the Court notes that within the area described that plaintiffs "as a class" reside, it is noted that there are three city parks of substantial size and another community facility (Klondike) lying just west of Watkins.[6] Dave Wells Community Center is also situated in North Memphis less than a mile from the western boundary of the area described as that in which plaintiffs assert a special interest. Plaintiffs assert that defendants in February "unlawfully prevented, and . . . continue to prevent the budgeting, planning, funding, and

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5. Plaintiff Greene's amended complaint goes into detail with regard to notice and a public hearing prior to the closure of West Drive, though he was dissatisfied with the conclusion the Memphis City Council reached.

6. University Park is about one-half mile from plaintiff Greene's residence; Gooch Park is little more; and May Park is within a mile.

construction of a $750,000 federal and state financed community center." They also claim that their civil rights and property rights and their "property-linked benefits and enjoyments" are damaged and deprived.

Apparently, by inference, plaintiffs claim that the defendants' failure to construct the community center equates to deprival of "basic human necessities," and deprivation of equal protection. Plaintiffs quote from *Beal v. Lindsay,* citation unknown, that availability of distant parks is not a consideration. The location of other nearby parks and recreation or community facilities is a matter of proper consideration and the Court takes judicial notice of the location of them on the attached map.

Nowhere in the complaint is it stated that the City's alleged failure to act was discriminatory to blacks, or to the poor, or how this amounted to a violation of equal protection. Assertion of not budgeting, planning, funding, or constructing a community center without any assertion of pertinent circumstances as to comparative or unequal treatment with relation to other citizens of the larger community does not state a cause of action for racial discrimination nor of a constitutional violation. *Gautveaux v. City of Chicago,* 480 F.2d 210 (7th Cir. 1973), cited by plaintiffs, relates to the refusal of Chicago authorities to locate public housing projects in white neighborhoods. There is simply no assertion in this complaint relating to housing project discrimination of the type involved in that case. *Feliciano v. Romney,* 363 F.Supp. 656 (S.D. N.Y. 1973) is similarly inapplicable as dealing with alleged failure under a number of federal statutes to relocate after eviction proceedings had been instituted in an area of Harlem.[7]

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7. *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968) is similarly inapplicable. Plaintiff also

(Continued on following page)

The determination whether to build and when or where to build a community center is essentially a political discretionary decision of City of Memphis officials. No allegation is made to indicate any constitutional deprivation in the decision made with respect to February, 1974. "Federal Courts are reluctant to enter the field of local government operations." *Hawkins v. Shaw,* 461 F.2d 1173. Compare *Coleman v. Aycock,* 304 F.Supp. 132 (N.D. Miss. 1969) which ordered racial desegregation of public facilities but held no need for the court to interfere with municipal operations relating to fire hydrants, paving streets, police protection, drainage, and the like. "The governing authorities of a municipality in the provision of public services and the operation of public facilities are entitled to the widest discretion, and the Court should not undertake to control or interfere with the exercise of such discretion in the absence of bad faith or abuse." *Supra,* 304 F.Supp. 146. No allegation of bad faith or gross abuse of discretion is made in this complaint. Indeed, Greene's amended complaint sets out in detail that the Council and defendants heard their contentions about the need for a community center in the Vollentine-Evergreen area and declined, after discussion and consideration, to insert that item in this year's budget. (There is in the amended complaint admittedly no basis for the conclusion in the original complaint that such community center would be federally and state financed.) A court does not ordinarily look

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Footnote continued—

relies on *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971); en banc, 461 F.2d 1171 (1972) which dealt with discrimination in service of necessities to a majority black population in a Mississippi town that had historically deprived them of necessities such as paved streets, street lights, sanitary sewers, water mains or drainage and fire hydrants. That case dealt "only with the town of Shaw, Mississippi, and the facts as developed in the record." 461 F.2d 1173. The Court noted a significant change in the situation with election of a black councilman. Memphis had at the time the suit was brought three black councilmen.

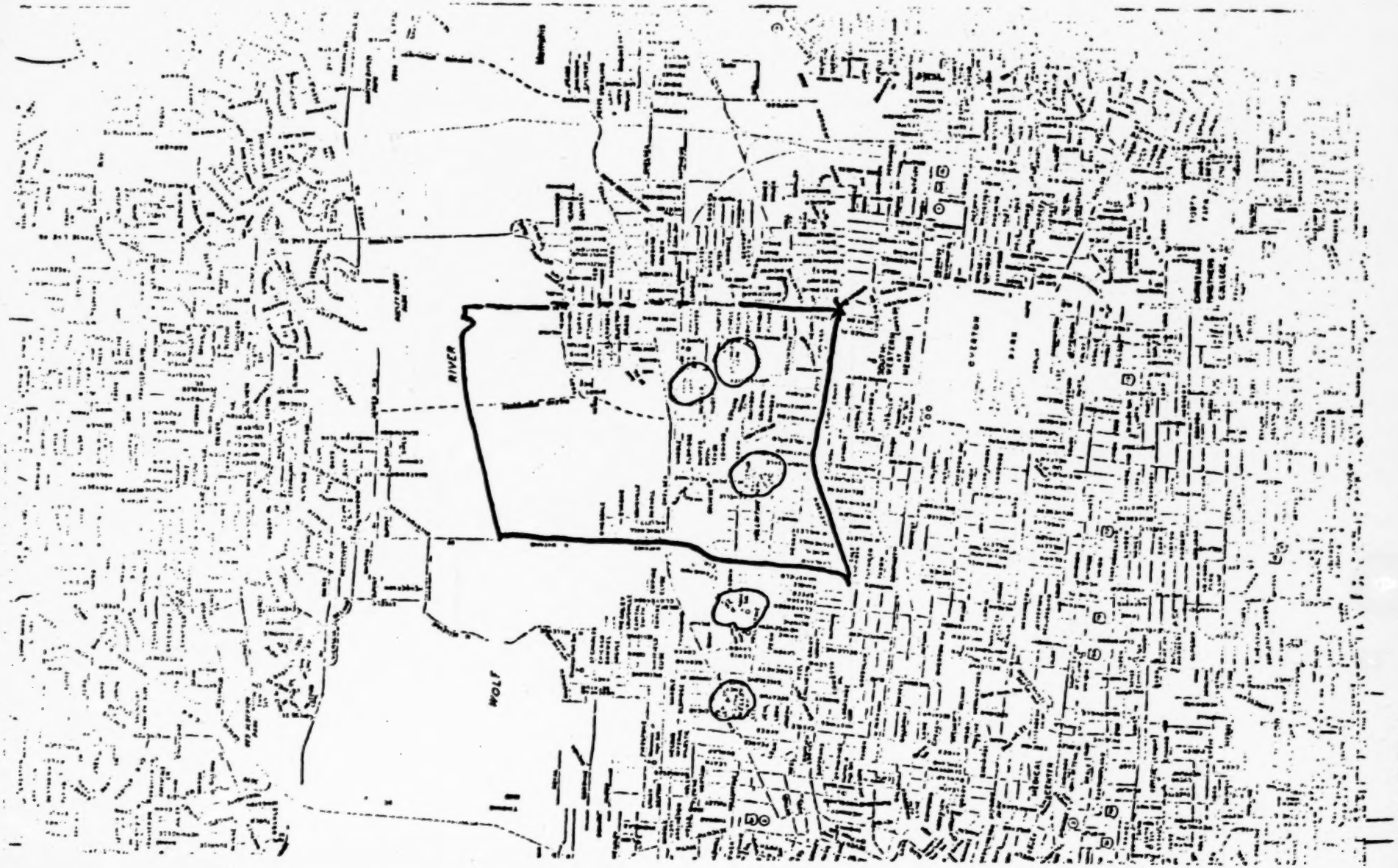
to the motives of the legislature or municipal council in adopting a law or ordinance of the kind under consideration. *Palmer v. Thompson, supra.*

Under any circumstances, however, the Court does not have the authority to order by way of mandamus defendants to do any act, non-ministerial or discretionary in its nature, such as requiring the City or defendants to plan and construct a community center. *Tannery Bass Anglers Sportsman's Society v. Scholze,* 329 F.Supp. 339, 350 (E.D. Tenn. 1971). This is not to say that the Court may not in a proper case order certain acts be done or not to be done to effect an end to prohibited discrimination, or to provide due process or equal protection in appropriate situations. The complaint or amended complaint fails to state a cause of action and should be dismissed except as to paragraph 11, Part II (page 15) of the amended complaint. This one section asserts that the actions of the City since 1970 in building community centers has demonstrated racial bias or prejudice. While the Court denies the relief requested in the form originally sought, it will proceed in this cause on the sole issue raised as to whether defendants since 1970 have, in fact, demonstrated racial bias in construction of community centers. Plaintiffs may be able to prove a set of facts in support of their claim (if it is "ripe" and if they have standing) which may entitle them to some relief. There is no constitutional notice or hearing issue, however, before the Court.

Except to the extent indicated in the last paragraph above, defendants' motion to dismiss is granted.

This 4th day of October, 1974.

/s/ Harry W. Wellford
United States District Court
Judge


RIVER
WOLF

N. T. GREENE, et al.,
Plaintiffs-Appellants,

v.

CITY OF MEMPHIS, a Municipal Corporation, et al.,
Defendants-Appellees.

No. 75-1339.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 13, 1976.

Decided May 13, 1976.

Action was instituted against city and various of its officials for alleged unlawful closing of street. The United States District Court for the Western District of Tennessee, Western Division, Harry W. Wellford, J., dismissed complaint for failure to state a claim, and one plaintiff appealed. The Court of Appeals, John W. Peck, Circuit Judge, held that complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council.

Reversed and remanded.

1. Civil Rights (Key) 13.12(3)

Complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was

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sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council. 42 U.S.C.A. §§ 1982, 1983.

2. Federal Civil Procedure (Key) 674

That individual plaintiff failed to specifically allege a claim under statute covering deprivation of civil rights did not operate to preclude him from recovering on that claim in event allegations showed and proof supported claim. 42 U.S.C.A. § 1983.

3. Civil Rights (Key) 13.13(1)

To establish that closing of street by city officials conferred certain benefits, to wit, privacy and quiet of exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods, plaintiff was required to prove that city officials conferred closed street on residents of area because of their color; he was also required to prove racial motivation, intent or purpose, in absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. 42 U.S.C.A. §§ 1982, 1983.

Raymond P. Gibbs, Murfreesboro, Tenn., for plaintiffs-appellants.

Joseph B. Dailey, Asst. City Atty., Charles V. Holmes, Memphis, Tenn., for defendants-appellees.

Before PHILLIPS, Chief Judge, and PECK and Lively, Circuit Judges.

JOHN W. PECK, Circuit Judge.

Plaintiffs Greene, Goldberger, Taylor, Wilshire Park Civic Club, and Shankman Hill Civic Club charged in

their district court complaint that defendants-appellees City of Memphis, its Mayor, its Council, and its Council Chairman unlawfully closed West Drive to through traffic and unlawfully deleted from the municipal budget a joint-funded $750,000 community center. By amended complaint, Greene charged that City had since 1970 located seven community centers on racial bases and closed West Drive on racial bases. The district court granted appellees' motion to dismiss, for failure to state a claim, Fed.R.Civ.P. 12(b)(6)[1] the West Drive and budget deletion claims, and Greene "petition[ed] for [an] interlocutory appeal." Prior to the district court's certifying such petition, the district court proceeded to a non-jury trial of the community center location claim, which was dismissed with prejudice at the conclusion of Greene's proof. Greene thereafter filed a notice of appeal.

On appeal, Greene[2] claims that the district court erred in granting the motion to dismiss. We agree. Axiomatically,

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1. Although appellees moved to dismiss also for lack of jurisdiction over the subject matter, Fed.R.Civ.P. 12(b)(1), and although the district court simply granted appellees' "motion to dismiss," subject matter jurisdiction under 28 U.S.C. § 1343(3) would have attached if a 42 U.S.C. § 1983 claim were stated. *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976); *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975). Likewise, if Greene had stated a 42 U.S.C. § 1982 claim, there was subject matter jurisdiction under 28 U.S.C. § 1343(4). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n. 1, 88 S.Ct. 2186, 2189 n. 1, 20 L.Ed.2d 1189, 1192 n. 1; *Jennings v. Patterson*, 460 F.2d 1021, 1022 (5th Cir. 1972); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1387 (M.D.N.C.1972). It follows that the district court dismissal was for failure to state a claim, Fed.R.Civ.P. 12(b)(6).

2. Although the court of appeals docket sheet styles Greene, Goldberger, Taylor, Wilshire Park Civic Club and Shankman Hill Civic Club as plaintiffs-appellants, "[p]laintiff, N. T. Greene," through his attorney, filed the petition for interlocutory appeal and notice of appeal. Similarly, the appellate brief refers to "appellant." The use of the singular apparently is significant in light of a letter in the record indicating the decision of a "Com-

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> "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L. Ed.2d 90, 96 (1974), quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

Scheuer emphasized that

> "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96.

Accord, *Dunlap v. State of Tennessee,* 514 F.2d 130, 133 (6th Cir. 1975).

[1] We view Greene as having stated claims under 42 U.S.C. § 1982 and 42 U.S.C. § 1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright,* 532 F.2d 552, 553 (6th Cir., filed March 23, 1976), citing *Scheuer, supra,* 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive

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Footnote continued—
mittee to Re-open West Drive" to "separate" its "petition" from Greene's "petition." Because the complaint prays for equitable relief ordering the city officials to keep West Drive open, rather than for damages, whether there is one or more than one appellant is for present purposes insignificant. See *Craft v. Memphis Light, Gas & Water Division,* 534 F.2d 684, 685-687 (6th Cir., filed April 12, 1976).

that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. Though we have found no section 1982 case on-point, the liberal construction that courts have afforded section 1982 buttresses our conclusion that Greene has stated a section 1982 claim. See, e. g., *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974); *Jennings v. Patterson,* 460 F.2d 1021 (5th Cir. 1972), 488 F.2d 436, 442 (5th Cir. 1974); *Battle v. Dayton-Hudson Corp.,* 399 F.Supp. 900, 905 (D.Minn.1975).

[2] That Greene failed to specifically allege a section 1983[3] claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e. g., *Janke Const. Co. v. Vulcan Materials Co.,* 527 F.2d 772, 776-77 (7th Cir. 1976), *aff'g* 386 F.Supp. 687, 692 n. 3 (W.D.Wis.1974); *Ailshire v. Darnell,* 508 F.2d 526, 528 (8th Cir. 1974); *Parr v. Great Lakes Express Co.,* 484 F.2d 767, 773 (7th Cir. 1973); *United States v. Martin,* 267 F.2d 764, 771 (10th Cir. 1958); *Dotschay v. National Mut. Ins. Co.,* 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those

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3. Neither the complaint nor amended complaint mentions section 1983, but both allege jurisdiction through 28 U.S.C. § 1343 (3), the jurisdictional counterpart of section 1983. The amended complaint also generally tracks the language of section 1983 in alleging that

> "[d]efendant's actions deprived plaintiff and others of their property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment. . . ."

"person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

Of course, no section 1983 claim is stated against the City of Memphis or its Council. See *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976).

The district court, in dismissing, relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed. 2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), which sustained closing of municipal swimming pools against equal protection challenges because the closings prevented whites and blacks equally from utilizing municipal swimming pools. Accord, *Mahaley v. Cuyahoga Metropolitan Housing Auth.*, 500 F.2d 1087, 1092-93 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975). Similarly, the closing of West Drive, as the district court noted, affects Greene "just [like] every other citizen," white and black, by "deny[ing] access to West Drive from the north." Yet, as noted above, the complaints also reasonably allege that the city has conferred certain benefits on white residents of West Drive, though refusing to confer those benefits on similarly situated black neighborhoods, thereby falling within the *Palmer* caveat that

> "[s]hould citizens of . . . [any] city be able to establish in court that public, tax-supported swimming pools are being denied to one group *because* of color and supplied to another, they will be entitled to relief." 403 U.S. at 227, 91 S.Ct. at 1946, 29 L.Ed.2d at 446 (emphasis supplied).

Similarly, the complaint falls within *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), 461 F.2d 1171 (5th

Cir. 1972) (*en banc*), which condemned the conferral of municipal services on racial bases.

We recognize that the allegations nowise approach the egregiousness of the facts found in *Town of Shaw,* and endorse the *Town of Shaw* caveat that it is not to be

> "impl[ied] or suggest[ed] that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record." 461 F.2d at 1173.

See *Towns v. Beame,* 386 F.Supp. 470 (S.D.N.Y.1974) (even assuming that the closing of eight fire companies had disproportionate impact on racial minority response areas, no "sufficiently serious" question of equal protection to justify preliminary injunction, where fire department has satisfactorily rebutted plaintiffs' prima facie case of racial discrimination by proving non-racial rationale for closings).

[3] To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. Compare *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968), and *Kelly v. Romney,* 316 F.Supp. 840, 844 (S.D.Ohio 1970), with *Town of Shaw, supra.* See also *Bronson v. Board of Educ.,* 525 F.2d 344, 347-49 (6th Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). See *Citizens Comm. for Faraday Wood v. Lindsay,* 507 F.2d 1065, 1070 n. 11, 1074 n. 6 (2d Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1679, 44 L.Ed.2d 102 (1975), and accompanying text. In *Palmer,* the closings left whites and blacks alike without muncipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

In reversing, we, of course,

> "intimate no evaluation whatever as to the merits of [Greene's] claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of [his] respective complaints, [Greene was] entitled to have them judically resolved."

Scheuer, supra, 416 U.S. at 250, 94 S.Ct. at 1693, 40 L.Ed.2d at 105.

Reversed and remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
NO. C-74-208

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, EDWIN OWENS,
CAROLYN BURSE,
Intervenors,

vs.

CITY OF MEMPHIS, A Municipal Corporation, WYETH CHANDLER, as Mayor, THE COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER, as Chairman of the Council of the City of Memphis,
Defendants.

MEMORANDUM DECISION

(Filed June 21, 1978)

This is a cause of action which was filed to prevent the implementation of the action of the defendants as officials of the municipality, the City of Memphis, Tennessee, from effectively closing a residential street to the public.

The case was dismissed previously by another Judge of this District upon a motion to dismiss for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Sixth Circuit reversed and remanded because it found that the original plaintiff Greene did state claims upon which relief might be granted. *Greene v. City of Memphis*, 535 F.2d 976 (C.A. 6 1976).

In remanding this case, the Court of Appeals stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property subject to having the city confer the dead-end street benefit on their property. 535 F.2d 978 . . . . We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d 978, 79.

After the remand the case was transferred to the undersigned Judge of this District and the original attorney for the plaintiffs was allowed to withdraw on his own motion. Considerable delay was encountered before new counsel was obtained. Intervention was allowed by three additional plaintiffs.[1]

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1. At the trial on remand the only original plaintiff who was still a party was N. T. Greene, who acted *pro se.* A. C. Wharton, Jr. of Memphis Area Legal Services ably represented the intervenors.

Motions to amend the complaint were allowed to allege the failure of the defendants to provide sidewalks on the street in question, the existence of a class action, and pendent jurisdiction of this Court to grant relief because the defendants did not comply with state laws and municipal ordinances and regulations.

A non-jury trial was held and this Memorandum Decision sets forth the findings of facts and conclusions of law of that trial.

Before setting forth the more specific findings of facts, the basic factual information must be stated.

The case pertains to a subdivision in the heart of Memphis, Tennessee, known as Hein Park. It was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

On July 9, 1973, an application was made by members of the Hein Park Civic Association for the closing of a portion of West Drive just south of its intersection with Jackson Avenue in Memphis, Tennessee (Trial Exhibit 13). The application states that the reasons for the requested closure are to: "1. Reduce flow of traffic using subdivision streets, 2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, 3. Reduce 'traffic pollution' in a residential area, e.g. noise, litter, interuption (sic) of community living." On the printed face of the application it is provided that "All owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the Procedure for Filing Street or Alley Closings and includes this same requirement. It was stipulated by counsel in the pretrial order that the purported owners of the two lots abutting the 25-foot strip of West Drive sought to be closed, signed the application submitted to the Planning Commission (Pre-Trial Order, page 6).

The Procedures listed on the back of the application also provide that additional owners may sign the application. The application contains the purported signatures of the owners of 26 lots on West Drive in addition to the two lots which are involved in the closing.

Sections 4 and 6 provide that the names of abutting property owners be shown on the plat that must be filed with the application. An examination of the plat filed with the application reveals that only the names of the owners of lots 53 and 77 along West Drive appear. Other lots along West Drive are denoted on the plat only by number.

The Planning Commission staff received a letter from Mrs. Sara F. Terry, a resident of West Drive, indicating her opposition to the proposed closing of West Drive at Jackson Avenue. Mrs. Terry indicated that she and her husband, Fred, had purchased the property at 732 West Drive and had lived there since April 28, 1973. Mrs. Terry testified at the hearing in this Court that she had been approached to sign the application by someone in the neighborhood and that she was told that the reason the closure was being sought was to eliminate "undesirable traffic." Mrs. Terry did not sign the application. She appeared before the Memphis City Council on January 29, 1974, and spoke in opposition to the resolution closing a portion of West Drive.

The staff of the Planning Commission interprets the phrase "owners abutting the thoroughfare to be closed" in its requirements for application to close streets or alleys to mean only those persons whose property physically touches some part of the street or alley that is to be closed to the public use. The property, once closed, is deeded by quit-claim deeds to these abutting owners.

Upon receipt of the application the Planning Commission staff followed the usual procedure and communicated with various departments of the City Government in an attempt to discern their feelings regarding the closure.

Memphis Light, Gas, and Water Division offered no objection to the closure provided an easement was retained for existing and future utility services. An examination of the resolution passed by the City Council indicates this condition was satisfied (T.E. 1, 5, 4, and 10).

South Central Bell Telephone System had no objection to the closing (T.E. 9).

The Fire Department indicated it could not approve the closure unless there was the 24-foot clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker (T.E. 11, 4). The resolution passed by the City Council provides for this to be done (T.E. 1).

A memorandum from the Director of the Memphis Police Department to a Planning Assistant of the Planning Commission indicated that police response time would be inhibited, but he believed that "the residents of the [West Drive] area are competent to decide which problem they prefer to live with." (T.E. 6).

The Sanitation Department sent three separate written communications to the Planning Commission regarding this closure. First they objected to the closure, then they offered no objection provided a turn-around was provided, and finally, they reported having no objection (T.E. 7, 8, 12). Mr. Paul Goldstein of the Planning Commission staff testified that he thought a turn-around was incorporated in the final plan; however, neither the specifications nor the resolution refer to a turn-around (T.E. 1, 13). Presumably, sanitation trucks will be allowed to utilize the same 24-foot clearance that is available to emergency vehicles for passage through the area.

There is no written communication from the Traffic Engineering Department after the time this application

was filed in July 1973. The file does contain an earlier set of writings from that department (collective T.E. 14). Mr. Goldstein explained that departmental work done prior to an application being filed may be part of the pre-application process.

It appears from the Traffic Engineering file that was forwarded to the Planning Commission that the department had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets in the subdivision. The then Traffic Engineer, Mr. Robert Fosnaugh, advised that, "From a practical standpoint . . . it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby achieving most of the original objective of the proposal." (Collective T.E. 14, page 3). A cover letter that accompanied the application to close West Drive at Jackson Avenue filed on July 9, 1973, indicates that it was upon Mr. Fosnaugh's recommendation and advice that the application to close a portion of West Drive was made (T.E. 13).

The Memphis and Shelby County Planning Commission voted at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved, with conditions relating to the Memphis Light, Gas and Water facilities and the Fire Department that have been previously mentioned. A copy of the letter informing the City Attorney of this action and requesting him to present the matter to the City Council was sent to Mr. and Mrs. Fred H. Terry, the objectors on West Drive (T.E. 4).

The matter came on for hearing before the City Council on January 29, 1974. At the City Council meeting after presentation of the proposal by Mr. Robert Miller, Executive Director of the Planning Commission, four per-

sons spoke in favor of the resolution and seven persons spoke in opposition, including Mrs. Fred H. Terry and the plaintiff N. T. Greene. Each side was given 15 minutes to present its views.

Both during and after the speakers' presentations members of the City Council asked questions concerning various aspects of the proposal and debated among themselves the merits and demerits of the proposal. After discussion, a vote was taken on the resolution to close a portion of West Drive with the certain conditions previously mentioned. The resolution passed (T.E. 26, 1).

On February 5, 1974, the City Council reconsidered the closure and again voted to close this portion of West Drive (T.E. 27, 2). The next week the City Council heard four speakers on the question of re-opening West Drive; however, no vote was taken, since the item was not on the agenda other than as a discussion item (T.E. 28).

On February 26, 1974, a resolution regarding the re-opening of West Drive was held over until March 5, 1974 (T.E. 29). On March 5, 1974, a hearing was held on a resolution that sought to re-open West Drive. There were nine speakers in favor of the re-opening, including plaintiff N. T. Greene. Two persons spoke in favor of keeping the street closed. The resolution regarding the re-opening of West Drive was voted on by the City Council and failed to pass (T.E. 30, 31).

When preparations for the hearing of this case were being made, city officials discovered an oversight in the earlier proceedings. Therefore, on January 31, 1978, the City Council passed a resolution correcting the legal description contained in the earlier resolution. Plaintiff, N. T. Greene, and Mr. A. C. Wharton, attorney for the intervening plaintiffs, spoke in opposition to this change. The

legal description contained in the 1974 resolution covered only the western half of the proposed closure, which was to be deeded to the abutting owner of lot 53 north. After amendment, the legal description contained in the resolution matches the area of West Drive that is to be closed according to the plans submitted by the applicant's engineer (T.E. 3, 41, 13).

Plaintiff N. T. Greene testified at the trial in this Court that the closure would compound the multitude of negative experiences that he has encountered as a black person. He complained that the closure would prevent convenient vehicular access to various facilities contained in Overton Park and would cause him, his family and neighbors psychological and emotional damage. His home is located on Terry Circle in Memphis, Tennessee, which is northwest from the intersection of West Drive and Jackson Avenue (T.E. 22). Insofar as his use of West Drive to and from his residence, the closure would cause him no actual inconvenience. He also complained of the fact that there are no sidewalks, curbs, or gutters along any portion of West Drive, a fact stipulated to by counsel (Pre-Trial Order, page 6).

Mrs. Elnora Priest Cross, an intervening plaintiff, testified that she would like to be able to go through West Drive. She has a friend who works at the home of someone who lives on West Drive and contacts her in the event of an emergency.[2] Mrs. Cross lives on Smith Avenue, which is a dead-end street in north Memphis (T.E. 22).

Mr. Edwin Owens, another intervening plaintiff, testified that he does not wish to have West Drive closed, nor does he wish the street that he lives on to be closed.

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2. Mrs. Cross will still be able to reach her friend; however, she will be inconvenienced by having to use a different route.

He is presently residing in another area of Memphis known as Frayser (T.E. 22). His chief complaints against the city government arise from conditions which existed at his previous address on Bellevue. They center around the fact that garbage trucks used to pass down the street emitting noxious odors on the way to the dump. He has also had to step off of buses into mud on some occasions because of a lack of sidewalks. These matters occurred in parts of Memphis other than West Drive. He does not know of a black neighborhood that has applied to have a street closed.

Mr. Harrell Moore, a licensed real estate broker for 17 years, testified that it was a benefit to residents to live on a closed street. He felt that the closing of West Drive would create a "utopian community." However, in his expert opinion there would not be a decrease in value experienced by the property owners located to the north of West Drive because of the closure.

Dr. Marvin Feit, an assistant professor at the University of Tennessee School of Social Work, testified that it was his opinion that closing West Drive would result in negative consequences in the form of hostility towards the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. He also was of the opinion that the closure would result in more disgruntled drivers.

Mr. Calvin Woods, Jr. indicated that he was opposed to the closure of West Drive because he felt that it would cause the traffic to be shifted over to his street, which is East Drive, north of Jackson.

Mr. Robert Miller, the Executive Director of the Planning Commission staff, testified in this cause that the motive of the Planning Commission staff in recommending the

closure of West Drive was to provide the residents of that street with a more tranquil neighborhood. He also testified that in his opinion the southbound traffic that would be prohibited by the closure would not be greatly inconvenienced by the closure since one block to the east there is a street, Trezevant, that gives straight access all the way to South Memphis and the State of Mississippi, and several blocks to the west there are University and McLean Streets, which are major thoroughfares offering additional access to southbound traffic to the nearby Overton Park and Snowden School and other more remote attractions south and west of Hein Park.

Mr. Paul Goldstein, a Planning Assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closings and making a field study of the area under scrutiny.

He explained that a document entitled "West Drive Street Closure" contained in the file was not an official document of the Planning Commission (T.E. 21). The document states in part on page 2, number 4, "As required on the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are handwritten above the typewritten word "affected" which has been crossed out.

Mr. Goldstein testified that these were the notes of Mr. Jerry Cook, an employee of the Planning Commission who was not a part of the street and alley closing section of the Planning Commission but rather was in the zoning section. He had been asked to attend a meeting concerning

West Drive that Mr. Goldstein could not attend and had prepared the notes as a result of that new assignment. He noted in his testimony that the official application does not require the signatures of "affected" owners. It only requires the "abutting" owners to sign (T.E. 13).

Mr. Goldstein's testimony reflects that the City of Memphis has on other occasions received and granted requests from residents of black neighborhoods to have streets or alleys closed. These are summarized below. However, it is noted that none of these involved closing a street for the purpose of stopping through traffic.

On July 3, 1973, six days prior to the application filing date in the West Drive case, the City Council closed a small portion of an alley located between East McLemore Avenue and Stafford Avenue, which is a black neighborhood in Memphis, Tennessee, thereby creating a dead end to the alley. The applicant was the Union Valley Baptist Church, acting through its black pastor. The church owned the property on both sides of the alley that touched the portion of the same that was to be closed, and only a representative of the church signed the application. None of the other owners along the alley, whose access to East McLemore by this route would be terminated, signed the application. The abutting owner agreed to pay $262.00 for a quit claim deed to the property involved. The application submitted states that the reason for the requested closure was to allow expansion of a church building by joining two separate parcels owned by the church into one larger parcel of land.

A similar application was received to close a portion of an alley bordered on both sides by the Vance Avenue Church of Christ. The trustees of the church are the only persons who signed the application. None of the other owners along the alley or across Vance have signed

the application. The area is a black neighborhood. The application states that the reason for the closure is that the "Church desires to improve lot to east of church structure and the subject portion of present alley as off-street parking facility." (T.E. 36). The Planning Commission file reflects that the Planning Commission approved the closure on July 3, 1974, with certain conditions relating to utility and telephone easements and Fire Department access. What action, if any, was taken by the City Council is not contained in the file.

In June of 1971, LeMoyne-Owen College, a black institution of higher learning in Memphis, applied for the closing of a portion of Louisa Street north of Saxon Avenue. The application reflects that the closure was essential to the completion of a building project and to the best use of the area. The college owned the property on both sides of the requested closure. Mrs. Eva Payne, whose property touched the closure at one corner, also joined in the application by a subsequent letter. The Planning Commission approved the closure in August of 1971 conditioned upon easements being provided or reserved for sanitary sewers and Memphis Light, Gas and Water facilities. On August 17, 1971, the City Council approved the closing by a resolution containing the above conditions (T.E. 33).

In two cases one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic (T.E. 34, 37). The applications, made in 1968 and 1972 respectively, contain the signatures of all persons who abut along the portions of street which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are black neighborhoods. The files reflect that the Planning

Commission approved both closures. On January 30, 1973, a resolution passed by the City Council approved the closure of Ruth Street and states that the abutting owners have agreed to pay $1,200.00 for the closing. The Benton Street file does not reveal any action taken by the City Council.

CONCLUSIONS OF LAW

As heretofore noted the Court of Appeals in its remand opinion directed that the issues to be considered included whether or not "the closing of West Drive left certain white residents with the privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street." Upon a consideration of the facts established, this Court concludes that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The Court of Appeals remand opinion also stated:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of the color, he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

After the remand opinion of the Court of Appeals in the case, the Supreme Court of the United States has spoken to this topic in the case of *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (Jan. 11, 1977). In doing so the Court explained the significance of "racially disproportionate impact" upon the standard of racial motivation and intent which is required to prove a constitutional violation.

The Supreme Court opinion stated in part:

> Our decision last Term in *Washington v. Davis,* 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . .
>
> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

The opinion also noted that the discriminatory purpose might be shown when a clear pattern of discrimination, unexplainable on grounds other than race, emerges from the effect of the state action even when the legislation ap-

pears neutral on its face. When the pattern is not stark (egregious), a court must look to other evidence.

On pages 267 and 268 the opinion sets forth several evidentiary sources for determining the issue of intent: (1) The historical background of the legislative decision, particularly if it reveals a series of official actions taken for invidious purposes. (2) The specific sequence of events leading up to the challenged decision. (3) Departures from the normal procedural sequence. (4) Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. (5) The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meeting, or reports. The list is not intended to be exhaustive.

This Court concludes that the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial

discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

Furthermore, the Court of Appeals remand opinion noted that the allegations of the complaint in this case in nowise approached the egregiousness of the facts in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (C.A. 5 1971), 461 F.2d 1171 (C.A. 5 1972) (*en banc*). In doing so the Court of Appeals remand opinion also endorsed the caveat that every disparity of services between citizens of a city does not create a right of access to federal courts for redress. 535 F.2d at page 979.

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

As heretofore noted, one of the evidentiary sources to establish discriminatory intent referred to in *Arlington Heights* was departures from the normal procedures.

In this case counsel for the intervening plaintiffs has urged that departures from the standard procedures not only establish discriminatory intent, but also the departure from normal procedures and the normal procedures which were followed did not afford the plaintiffs and the members of their class minimal procedural due process; in that they were given no notice of the hearing, they were not provided a meaningful hearing, and the processes followed in street closing are not based upon clear standards. This Court concludes that there were not significant departures from normal procedures and that there was not a denial of due process based upon lack of notice and a meaningful hearing.

With regard to the lack of clear standards in street closing proceedings, the Court notes that alley and street closings are infrequent and unusual, and each one presents different factors to be taken into consideration by the city officials. As the Supreme Court noted in *Arlington Heights,* "In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits, absent a showing of arbitrariness or intentionality." In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

In summary this Court concludes that the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority. This includes the relief sought in an amendment to the complaint which sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. There was no proof which would authorize this Court to intervene on a racial disparity basis and this Court is not the proper forum to seek to enforce the ordinance of the City of Memphis pertaining to the installation of curbs, gutters and sidewalks in the absence of a constitutional deprivation in the wording or application of the ordinances.

Another post remand amendment to the complaint asks that this Court exercise pendent jurisdiction in order

to require the defendants to correct the wrongs caused by the failure of the defendants to follow their own procedures and the law of Tennessee. In this regard the plaintiffs contend that the defendants used a definition of "abutting owner" that was too narrow and that the defendants abused their discretion and were guilty of fraud in closing West Drive, which is prohibited under the law of Tennessee as announced in *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 SW 2d 168 (1963). This Court concludes that the evidence does not support a recovery under these or any other theory under the law of Tennessee.

For the reasons set forth above the Clerk of this Court is directed to enter a Judgment for the defendants.

ENTER: This 21 day of June 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

Nos. 78-1527-8

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N. T. GREENE,
Plaintiff-Appellant (78-1527),

ELNORA PRIEST CROSS, EDWIN OWEN and CAROLYN BURSE (78-1528),
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS and EDWIN MCBRAYER,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed November 1, 1979.

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which KEITH, Circuit Judge, joined. CELEBREZZE, Circuit Judge (pp. 21-28), filed a separate dissenting opinion.

ENGEL, Circuit Judge. This litigation arises out of efforts by the residents of Hein Park, a subdivision located in Memphis, Tennessee, to close West Drive at its northerly end so as to bar all through traffic.[1] As found by the district court, Hein Park

> was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the

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1. A map of central Memphis is attached hereto as an appendix.

> west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.
>
> The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

As the map indicates, Springdale Street is, in fact, a northward extension, under another name, of West Drive.

The proposed closing is described by the district court in its opinion:

> The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

Although the record is uncertain whether the northernmost property owners who are acquiring the east-west strip across the width of West Drive will, in fact, bar all foot traffic as well, it is clear that the proposed conveyance

will leave them with the absolute right to do so if they wish, since the property will be private in all respects except for retained rights-of-way for certain service and emergency vehicles and utility easements.

Plaintiffs, certain black individuals and members of a class of black persons in the City of Memphis who own or stand to inherit property immediately to the north of and adjoining the Hein Park area, have attempted from the beginning to prevent the closing. They principally claim in this lawsuit that the closing of West Drive deliberately creates a barrier between the all-white Hein Park subdivision and the predominantly black residential area to the north, limiting access to and from the latter and impairing their property values. The closing is claimed to be a violation of their rights under the Thirteenth and Fourteenth Amendments;[2] they seek relief under 42 U.S.C. §§ 1982 and 1983.[3]

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2. U. S. Const. amend. XIII provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend. XIV, in part, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. § 1982 (1976) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(Continued on following page)

In an earlier appeal, our court reversed a judgment of the district court which dismissed the original complaint for failure to state a claim. In so doing, we held that the district court relied too heavily on *Palmer v. Thompson*, 403 U.S. 217 (1971), and its ruling that the closings of municipal swimming pools would not violate the Equal Protection Clause of the Fourteenth Amendment where it was shown that such closings prevented whites and blacks equally from enjoying the pools. *Greene v. City of Memphis*, 535 F. 2d 976 (6th Cir. 1976) (*Greene I*). In remanding, we held that the facts alleged in the complaint, construed in the light most favorable to the plaintiffs, stated claims under 42 U.S.C. § 1982 and, even though it had not then been specifically pleaded, under 42 U.S.C. § 1983. In dicta, our court further observed that:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. [citations omitted]
>
> This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held

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Footnote continued—

42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). [citations omitted]
>
> In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

535 F.2d at 979-80.

Upon remand, amendments to the complaint were filed certain additional individuals moved and were permitted to intervene as plaintiffs and the court certified this as a class action.[4] Thereafter a bench trial was conducted on

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4. The class was certified in accordance with a stipulation filed by the parties. That stipulation, in part, provided:

> 1. That the civil action brought by the plaintiff-intervenors through their complaint for intervention, as amended, may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2).
>
> 2. That the class is composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.
>
> 3. That the issues embraced by this class action are to be confined to those in which injunctive or declaratory relief predominate.
>
> 4. That the monetary damage claims contained in the complaint, as amended, are made on behalf of the individual plaintiff-intervenors, and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

the merits before the district judge who on June 21, 1978, entered a judgment in favor of the defendants on all remaining issues. In doing so, the judge obviously deemed himself confined to the rationale expressed in the dicta of our earlier opinion of reversal. Thus, his primary focus was on that proof which showed what action was taken by the City of Memphis on petitions filed from time to time by private citizens, white and black, to close streets and alleys within the city. In this respect the court observed that

> the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

* * *

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

* * *

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

While ruling against the plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon

> the black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the

corner to—I would be interested to know who is going to pay the eight hundred dollars [the agreed price of the 25-foot strip across West Drive]. If we get those two people to agree and lend us their names, we can stop these people on the north.[5]

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, in-

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5. The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just —

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) blacks?

MR. SPEROS: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that that is one of the areas that — we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

creased vandalism, school harassment, and increased arrests by police."[6] The trial judge additionally relied in his find-

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6. Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most important things that I think will occur is an increase in hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harrassment [sic] on the part of the children in the community that attend Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favoritism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and in the area, particularly in Hein Park.

Q So that you are not restricted — well, let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area?

A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the city of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably

(Continued on following page)

ings upon the testimony of plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area", his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it [the street closing], would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future.

The foregoing citations from the record can only be reconciled with the court's ultimate decision by conclud-

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Footnote continued—

> bring about an increase in arrests and harrassment [sic] of more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.
>
> * * *
>
> . . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

ing that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief. If this was, in fact, the limit of the inquiry, the decision must be upheld, for indeed the record did not show that any black resident had ever sought to close a street primarily for purposes of reducing the traffic and contributing to the tranquility of a given neighborhood. We have considerable sympathy with the trial judge's view of his responsibility on remand since it seems supported at least by the cited dicta of our opinion. We do not conceive, however, that this was ever the full intent of our earlier decision, and it seems equally clear that the plaintiffs themselves never abandoned their effort to seek relief on a broader basis. Plaintiffs' posture in their pleadings and throughout the trial was consistent with the closing argument of their counsel:

> Going back to *1982*, which refers to the rights of blacks to hold their property in the same manner as whites, we feel that the closing of West Drive and the enhancement of the value of the properties along West Drive and the attendant and simultaneous decrease in property values that we think we have established here by the testimony of our witnesses in the black neighborhood does deny them a right protected by Section 1982. If the right is to uphold your property, we think that that right has been deprived. Not necessarily from the comparative standpoint of have black citizens ever applied for a street to be closed of this size and didn't get it, and then just close off the inquiry there.
>
> Now we understand the parameters of the Sixth Circuit's decision in this, but we would suggest that the

> interpretations of *1982* refer to the full panacean [sic: panoply] of property rights, not necessarily the transfer of property.
>
> Now, we also ask this Court in reviewing this matter be mindful of the Supreme Court's starting point and its instruction of how a case of this nature should be considered. We think that they key language; and I think this is of supreme importance here, the key language is that the Court has to conduct a sensitive inquiry. It would be our argument and it is our argument that a sensitive inquiry in a matter of this type where we are contending that there was racial motivation, racial impact entails taking in everything that was brought forth here.

The "sensitive inquiry" referred to by counsel for the plaintiffs was taken from language of the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There the Supreme Court was faced with the question of whether the refusal of the Village of Arlington Heights to authorize the construction of a public housing project within its boundaries in suburban Chicago was racially discriminatory and violated the Fourteenth Amendment. As Mr. Justice Powell observed:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis, supra,* [426 U.S.] at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears

> neutral on its face. *Yick Wo v. Hopkins,* 118 U. S. 356 (1886); *Guinn v. United States,* 238 U. S. 347 (1915); *Lane v. Wilson,* 307 U. S. 268 (1939); *Gomillion v. Lightfoot,* 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

Id. at 266 (footnotes omitted).[7]

While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed

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7. Mr. Justice Powell was referring here to *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), and its holding that the petitioners were illegally imprisoned for failure to comply with a city ordinance where such failure was the result of the city's refusal to consent to the petition of approximately 200 persons of Chinese ancestry to operate a laundry business while the same consent was granted 80 others who were not of Chinese descent. The Court held that this worked an impermissible denial of the equal protection of the laws and hence a violation of the Fourteenth Amendment, even where no express evidence of intent was found. In this regard the Court found the facts themselves sufficient:

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. *Id.* at 374.

In *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), also cited by Mr. Justice Powell, the Supreme Court struck down a local act of the Alabama legislature which redefined the boundaries of the City of Tuskegee with the effect of removing from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. As Mr. Justice Frankfurter observed:

> The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections. *Id.* at 341.

too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indeed "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]

We readily acknowledge that, as a general proposition, street closings are a matter of purely local concern. We also recognize that street closings may, indeed, be a very beneficial way of preserving the residential character of a neighborhood against the growing incursion of traffic from outside sources. Thus we take note of plaintiff's reliance upon *Arlington County Board v. Richards,* 434 U.S. 5 (1977), and the Court's observation that:

> A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter.

Id. at 7.

We further recognize that not every racially discriminatory act constitutes a badge of slavery. *See, e.g., Civil Rights Cases,* 109 U.S. 3, 24-25 (1883). *Cf. Runyon v. McCrary,* 427 U.S. 160, 211 (1976) (White, J., dissenting) ("A racially motivated refusal to hire a Negro or a white

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8. Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983. Neither our circuit nor the Supreme Court has decided this question. We note, however, that constitutional rights other than those contained in the Fourteenth Amendment have been protected under Section 1983. *See, e.g., Lane v. Wilson,* 307 U.S. 268 (1939) (violation of Fifteenth Amendment remedied under R.S. § 1979, the predecessor of Section 17983).

babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery. . . ."). Nonetheless, the Supreme Court "recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom. . . .'" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (quoting *Civil Rights Cases, supra,* 109 U.S. at 22).[9]

We are convinced that the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood under the particular circumstances found by the court here is precisely the type of "badge" which was the target of the Thirteenth Amendment and of Section 1982.[10] The broad reach of Section 1982 was repeatedly emphasized by Mr. Justice Stewart in *Jones, supra,* 392 U.S. at 422-37. As the Supreme Court later observed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969), "[a] narrow construction of the language of § 1982 would

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9. Senator Trumbull, the sponsor of the bill which ultimately became the Civil Rights Act of 1866, stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights.

36 Cong. Globe 474 (1866).

10. We also note that Section 1982 is limited in its scope to situations having a racial character. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel,* 384 U.S. 780, 791 (1966).

be inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act]."

42 U.S.C. § 1982 was enacted under authority of Section 2 of the Thirteenth Amendment.[11] *Jones, supra,* 392 U.S. at 413. Congress therein determined that the disability of blacks to enjoy property in the same manner as whites was a badge and incident of slavery. *Id.* at 439.[12]

While the Supreme Court has not often been required to define "badge of slavery" under the Thirteenth Amendment, it is clear that many badges of slavery either were a part of the recent past or remain a part of the present. As Mr. Justice Douglas stated:

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11. 42 U.S.C. § 1982, in its original form, was enacted as part of the Civil Rights Act of 1866. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144, and codified in § 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1982.

12. Mr. Justice Bradley in the *Civil Rights Cases, supra,* 109 U.S. at 20, stated regarding the Thirteenth Amendment:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.
>
> It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane v. Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder v. West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown v. Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania v. Board of Trusts,* 353 U. S. 230; *Sweatt v. Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving v. Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan v. Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley v. Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson,* 163 U. S. 537; public parks, *New Orleans Park Improvement Assn. v. Detiege,* 358 U. S. 54; restaurants, *Lombard v. Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore v. Dawson,* 350 U. S. 877; municipal golf courses, *Holmes v. City of Atlanta,* 350 U. S. 879; amusement parks, *Griffin v. Maryland,* 378 U. S. 130; buses, *Gayle v. Browder,* 352 U. S. 903; public libraries, *Brown v. Louisiana,* 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he

> addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton v. Alabama,* 376 U. S. 650.

Jones, supra, 392 U.S. at 445-46 (concurring opinion).

The closing of West Drive is merely another device leading to the same result. It would be, to blacks and whites alike, exactly what the trial judge said it was: an unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision. "When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Jones, supra,* 392 U.S. at 442-43.

Without endeavoring to establish any legal guidelines for the determination of when conduct may amount to a badge of slavery, we find the determinations made by the district court here to be altogether adequate to bring the conduct complained of within that description. The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable". Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the prop-

erty values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.[13]

OTHER ISSUES

In addition to their Sections 1982 and 1983 claims, the plaintiffs raised certain pendent state claims. The district court held that "the evidence does not support a recovery under these or any other theory under the law of Tennessee". The appellants have not questioned that decision in this appeal; we therefore have not considered it. The plaintiffs also sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. The district court found no basis for such relief and we agree. We likewise agree with the district court's decision that the plaintiffs failed to prove their claim of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments.

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13. We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. *Compare* Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L. J. 1267 *with Comments, Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y.U.L. Rev. 1030, *Cf. County of Los Angeles v. Davis*, ... U.S. ....., 99 S. Ct. 1379, 1386 (1979) (Powell, J., dissenting) (whether case brought under 42 U.S.C. § 1981 requires proof of racially discriminatory intent or purpose is an open question).

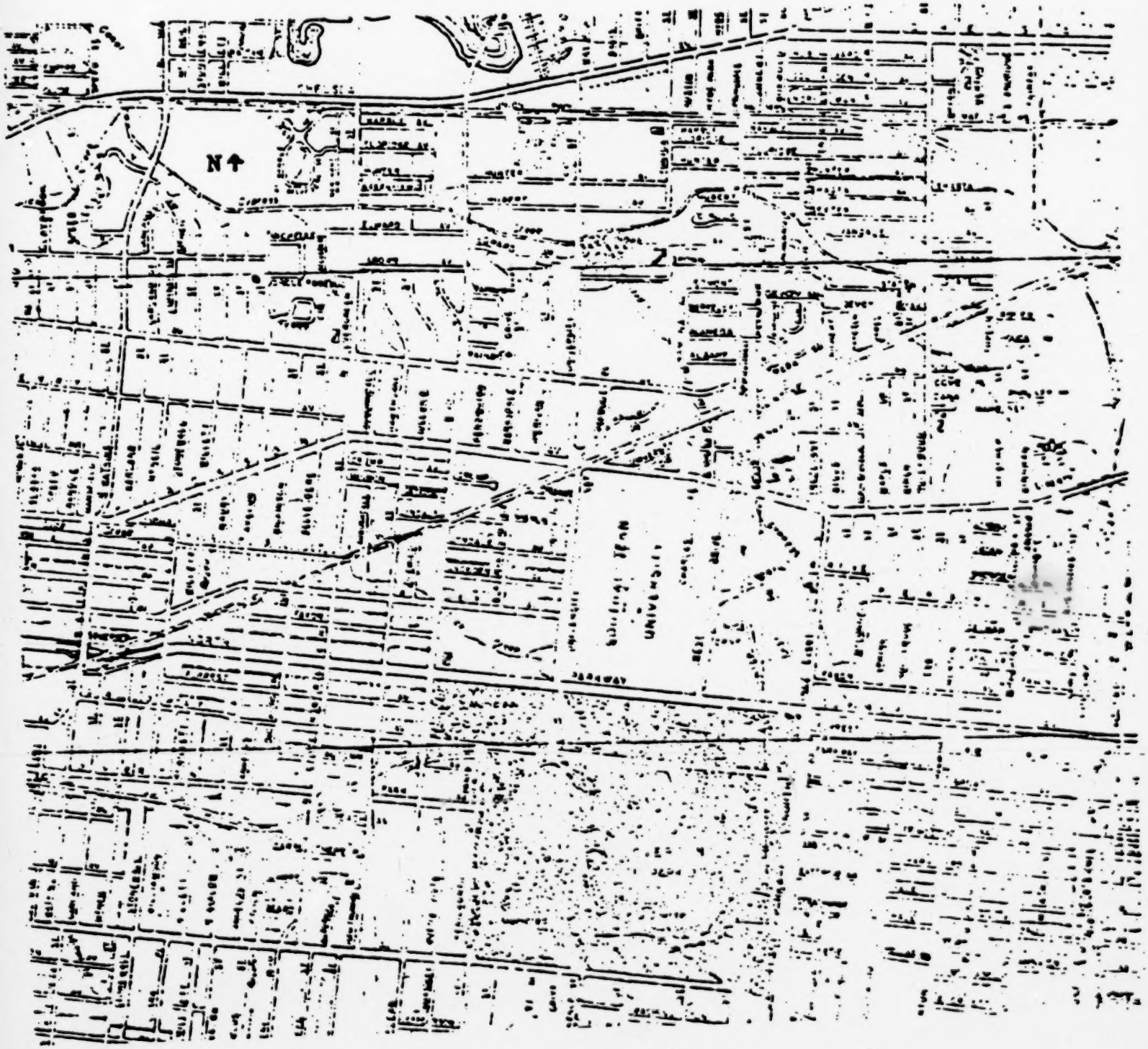
CONCLUSION

In conclusion we hold that under the unique circumstances shown here, the erection of the barrier at the northerly boundary of West Drive constitutes a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment and entitling them to a remedy under Section 1982.[14] Accordingly, the judgment of the district court is reversed and the cause remanded for the fashioning of appropriate injunctive relief.

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14. "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." *Jones, supra*, 392 U.S. at 414 n. 13.

APPENDIX A



CELEBREZZE, Circuit Judge, Dissenting

I must respectfully dissent because I am convinced that the majority has erred in several important respects. First, I do not believe that 42 U.S.C. § 1982 is violated by a municipality's exercise of its police powers to close a street when race is not a factor in that decision. The closing of West Drive here does not deprive black citizens of their right to hold property free from racial discrimination in the same manner as white citizens. The majority's extension of § 1982 so as to proscribe the closing of West Drive expands the scope of the statute to an unprecedented extreme and conflicts with the well-established policy of judicial deference to legislative judgment in land use regulation. Indeed, today's decision illustrates the need for a limiting principle for claims arising under § 1982. To this end I would require a showing of discriminatory intent or purpose to establish a violation of § 1982.

Second, the proper focus of this litigation, as recognized by the district court, is whether a racial minority would be denied the equal protection of the laws by the proposed street closing. I believe the district court was correct in finding that the plaintiffs had failed to demonstrate the discriminatory intent necessary to establish a violation of the equal protection clause of the fourteenth amendment. I would accordingly affirm the judgment of the district court.

I

In *Jones v. Alfred H. Mayer Co.*, 92 U.S. 409 (1968), the Supreme Court held that the enabling clause of the thirteenth amendment vests Congress with the power to identify "badges of slavery" and pass remedial legislation "necessary and proper" to eliminate them. *Id.* at 439-40. In enacting 42 U.S.C. § 1982 Congress found discrim-

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ination against blacks in the sale and rental of property to constitute such a "badge of slavery" prohibited by the thirteenth amendment. *Id.* at 440-41. § 1982 accordingly outlaws all racial discrimination, public and private, in the sale, rental, or holding of real property.

The majority's focus in this litigation is whether the right of black citizens residing north of Hein Park to "hold" their property in the same manner as white citizens residing in Hein Park would be violated by the erection of a traffic barrier on a street connecting the two neighborhoods. The majority concludes that the construction of the barrier will adversely affect black property owners north of Hein Park while at the same time benefiting white residents in Hein Park. In this disparate impact the majority discerns a violation of § 1982 and the thirteenth amendment.

It is true that the scope of § 1982 is exceptionally broad, reaching all public and private discrimination in activity affecting real and personal property. *Jones*, 392 U.S. at 437-39. The statute's proscription of racial discrimination against a citizen "holding" real property does not, however, preclude the legitimate exercise of a municipality's police powers. Where, as here, a municipality exercises those powers in a rational manner to achieve permissible goals,[1] absent evidence of racial motivation or intent, the right to "hold" property in the manner secured by § 1982 is not violated.

The right to "hold" property is the right to maintain possession while enjoying the privileges and benefits which

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1. The stated objectives of the application to close West Drive were: 1) to reduce the flow of traffic; 2) to enhance safety for children who walk to school; and 3) to reduce traffic pollution in the residential area such as noise and litter. The legitimacy of these goals is well established. *See Arlington County Board v. Richards*, 434 U.S. 5, 7 (1977).

ownership or occupancy entails in a manner untainted by racial discrimination. That right does not include an inviolate license of universal street access. Rather, street access, falling as it does within the legislative province is a subject exclusively within the legislative province and subject to regulation in the public interest.[2] There is no requirement that legislative decisions regarding land use affect all persons equally. By definition, a street closing will not result in an identical impact upon residents and non-residents.

The closing of West Drive would have a disproportionate impact both racial and geographical in nature. As a result of racial residential segregation in the area, the black neighborhood north of Hein Park will no longer have access to West Drive, while the white Hein Park neighborhood will enjoy the increased solitude and safety accruing from a decrease in traffic. While distinctions based on race are inherently suspect, distinctions between residents and non-residents of a local neighborhood are not invidious. *Arlington County Board v. Richards,* 434 U.S. 5, 7 (1977).

In light of the deference accorded legislative judgments in matters of land use regulation,[3] and because the district court's finding of an absence of racial motivation is supported by the record, the proposal to close West Drive must be viewed as creating a distinction based upon residency, not upon race. Since distinctions between residents and non-residents are permissible, without proof of

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2. Although matters of land use are within a municipality's police powers, the wide latitude in classifying and limiting property uses is always "[s]ubject to specified constitutional limitations." *Berman v. Parker,* 348 U.S. 26, 32 (1954).

3. *See Arlington County Board v. Richards,* 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

racial motivation or intent I cannot conclude that the racially disproportionate impact here is sufficient circumstantial proof of the racial discrimination outlawed by § 1982.

Indeed, today's decision represents an unfortunate overreading of section 1982. The majority's willingness to characterize the proposed street closing as a violation of § 1982 demonstrates the need for a limiting principle for actions brought under this section. The section 1982 screening mechanism, as in actions proceeding directly under the fourteenth amendment, should be a requirement of a showing of discriminatory intent.

Although the district court did not analyze the case under § 1982 and the thirteenth amendment, the majority faults the district judge for placing "too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment." The district court, however, did no more than follow the directions issued by this court in remanding the case:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; *he must prove racial motivation, intent, or purpose,* in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976) (emphasis added).

The majority dismisses this instruction as dictum and does not address the question of whether cases brought under § 1982 — like cases brought directly under the fourteenth amendment — always require proof of discriminatory intent. I believe that we are required to follow

the explicit instructions of our prior decision regarding the components of a § 1982 claim, and would therefore require a showing of discriminatory intent to establish a violation of section 1982.

Interpreting section 1982 to require discriminatory intent is consistent with the Supreme Court's admonition in *Jones* that Congress intended section 1 of the Civil Rights Act of 1866 — the source of § 1982 — "to prohibit *all racially motivated* deprivations of the rights enumerated in the statute. . . ." 392 U.S. at 426. (emphasis added). Section 2 of the 1866 Act reinforces the requirement of racial intent by imposing sanctions upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.

The legislative history of § 1982 also indicates that it should parallel the fourteenth amendment's standard of proof. Although the 1866 Act, the forerunner of § 1982, is generally regarded as a "Thirteenth Amendment statute," *See Jones,* 392 U.S. at 422, 437-38, it has also been found to rely on the fourteenth amendment. The fourteenth amendment was enacted, in part, to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436. It is not unreasonable to conclude that the standards for establishing a prima facie case of discrimination under § 1982 and the equal protection clause of the fourteenth amendment should be the case: there must be proof of discriminatory intent.

Finally, an observation made by the Supreme Court in *Washington v. Davis,* 426 U.S. 229 (1976), is relevant here. The court was concerned about the problems that could be generated if the fourteenth amendment was violated by a mere showing of disparate racial impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248 (footnote omitted).

Section 1982, extending as it does to the expansive realm of both public and private action involving property, might well precipitate many of these same consequences if proof of discriminatory intent is not required. For these reasons, I cannot agree that the facts and circumstances of this case establish a violation of 42 U.S.C. § 1982.

II

The district court based its decision in favor of the City of Memphis on the plaintiffs' failure to establish the requirements of a prima facie case under the equal protection clause of the fourteenth amendment. The district court found that the closing of West Drive would have a "disproportionate impact on certain black citizens," but there was not "sufficient proof or racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." Moreover, the district

court did not believe that the disparate impact was so stark that an intent of racial discrimination could be inferred. I conclude that the district court's findings of fact and conclusions of law are neither clearly erroneous, F.R.Civ.P. 52(a), nor incorrect as a matter of law.

Recent Supreme Court decisions mandate that to establish that a governmental defendant has deprived plaintiffs of constitutional rights guaranteed by the fourteenth amendment, something more than a disproportionate discriminatory impact must be shown. Proof of a racially discriminatory intent or purpose is also required to show a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-45 (1976). The recent opinion of *Personnel Administrator of Mass. v. Feeney*, ... U.S. ..... (1979), provides a functional definition of "intent":

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at ..... (footnote omitted).

Applying the Supreme Court's elaboration in *Feeney* of the *Washington v. Davis* and *Arlington Heights* impact-plus test, the district court's conclusions are, if anything, reinforced. The record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive "because of" the adverse effects the black citizens north of Hein Park might experience.

The absence of evidence of discriminatory intent does not, however, signal the end of the inquiry. Under the applicable *Arlington Heights* criteria, "invidious discriminatory purpose" can be inferred or detected through an inquiry which weighs a number of factors. Proof of discriminatory intent does not pose an insurmountable obstacle because *Arlington Heights* liberalized the probative value of various kinds of circumstantial evidence relevant in an inquiry into motive.

The first *Arlington Heights* factor — disparate impact — is present here. As I indicated, the disparate impact of the closing of West Drive is both racial and geographical in nature. I believe that the district court was correct in concluding that this disparity does not constitute a stark pattern of discrimination from which racial intent can be inferred. It is clear that disparate impact, standing alone, will only infrequently suffice to establish an equal protection violation. *Washington v. Davis*, 426 U.S. at 242; *Arlington Heights*, 429 U.S. at 265-66. Absent a stark pattern of discrimination from which intent may be inferred, further inquiry is necessary.

The second evidentiary source bearing on intent is the historical background of the decision. Particularly relevant here would be a "series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Upon careful examination, the background of the decision to close West Drive appears untainted by any invidious action. The legislative machinery was set in motion by the submission of an appropriate application to the Planning Commission. The Commission processed the application and in time, the City Council voted to approve the closing. In sum, the "background" of this decision fails to reveal racial intent. And the same result is reached in considering the third factor specified in *Arlington Heights*

— the specific sequence of events leading to the challenged decision.

The district Court's opinion does not record any instances of departures from normal procedural sequences or any "substantive" departures from normal decisionmaking (the fourth and fifth *Arlington Heights* factors). To the contrary, the decision to approve the closing of West Drive is consistent with the approvals granted other applications to close streets and alleys. It is true that the West Drive application is the first attempt to close a street in the nature of West Drive. Yet I cannot subscribe to the view that the initial attempt to utilize procedures prescribed by law for closing a street, without more, constitutes circumstantial proof of racial bias.

Where, as here, the applicable *Arlington Heights* "evidentiary sources" for a gleaning of official intent fail to reveal direct and circumstantial proof of discriminatory intent, an inference of invidious purpose cannot be drawn. I do not find from the record before me that in closing the street the City infringed upon constitutional rights, nor do I find that the City acted with malice or intent to discriminate because of race. Therefore, I would affirm the district's court's decision that the fourteenth amendment has not been violated.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
78-1527

N. T. GREENE,
Plaintiff-Appellant,

and

EDWIN OWENS, et al.,
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, et al.,
Defendants-Appellees.

ORDER

(Filed December 11, 1979)

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges

Defendants-Appellees have filed herein a petition for rehearing with a suggestion that the petition be heard by the court sitting en banc. Less than a majority of the judges of this court who are in regular active service of this court having favored rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. Upon consideration, it appearing that the petition presents no issues which have not already been fully considered by the court.

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Judge Celebrezze would grant the rehearing for the reasons set forth in his dissenting opinion previously filed.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 78-1527

N. T. GREENE,
Plaintiff-Appellant,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendant-Appellees.

ORDER STAYING MANDATE

(Filed January 18, 1980)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 78-1528

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, DEWIN OWENS AND CAROLYN BURSE,
Intervenors-Appellants,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

(Filed January 18, 1980)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk